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March 13, 2012

VIA ECF

Diane P. Wood, Circuit Judge
J.P. Stadtmueller, District Judge
Robert M. Dow, Jr., District Judge
United States District Court for the
Eastern District of Wisconsin
517 East Wisconsin Avenue
Milwaukee, Wisconsin 53202

Baldus, et al. v. Brennan, et al., Case No. 11-CV-00562-JPS-DPW-RMD

Your Honors:

We write, again without advocacy, to call to the Court's attention two orders issued in the past week by the Dane County Circuit Court. Both orders hold that 2011 Wisconsin Act 23, which requires Wisconsin electors to produce one of several specific forms of government-sanctioned photo identification to vote in an election, violates the Wisconsin Constitution, and both enjoin the State of Wisconsin from enforcing the statute. *See League of Women Voters of Wis. Educ. Network, et al. v. Scott Walker, et al.*, No. 11 CV 4669, Decision and Order Granting Summary Declaratory Judgment and Permanent Injunction (Cir. Ct. March 12, 2012) (attached as Exhibit 1); *Milwaukee Branch of the NAACP, et al. v. Scott Walker, et al.*, No. 11 CV 5492, Order Granting Motion for Temporary Injunction (Cir. Ct. March 6, 2012) (attached as Exhibit 2).

In addition, we bring to the Court's attention revised information posted yesterday on the Government Accountability Board's website, announcing the GAB's decision with respect to petitions submitted to recall four Wisconsin State Senators that "each of the four recall committees collected enough valid signatures to trigger recall elections." The same "Recall Petition Update" contains updated information about the timing of any recall elections that might be held. (http://gab.wi.gov/node/2257)

Both the voter identification legislation addressed in the Dane County Circuit Court orders and the Wisconsin State Senate recall petitions and elections were the subject of testimony and argument at the trial in the *Baldus* case and were addressed in briefs submitted to the Court.

Very truly yours,

GODFREY & KAHN, S.C.

s/ Douglas M Poland

Douglas M. Poland

cc: Maria Lazar (by ECF)
Patrick Hodan (by ECF)
Daniel Kelly (by ECF)
Peter Earle (by ECF)
P. Scott Hassett (by ECF)
Thomas L. Shriner, Jr. (by ECF)

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EXHIBIT 1

STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

BRANCH 9

LEAGUE OF WOMEN VOTERS
OF WISCONSIN EDUCATION
NETWORK, INC. and
MELANIE G. RAMEY.

Plaintiffs,

v. Case No.

11 CV 4669

SCOTT WALKER,
THOMAS BARLAND,
GERALD C. NICHOL,
MICHAEL BRENNAN,
THOMAS CANE,
DAVID G. DEININGER, and
TIMOTHY VOCKE,

Defendants.

DECISION AND ORDER GRANTING SUMMARY DECLARATORY JUDGMENT AND PERMANENT INJUNCTION

STATEMENT OF THE CASE

Article III, Section 1 of the Wisconsin Constitution specifies who may vote in Wisconsin:

> **Section 1. Every United States citizen age 18 or older who is a resident of an election district in this state is a qualified elector of that district.**

Article III, Section 2, ¶ (4) of the Wisconsin Constitution authorizes the government to exclude from voting those otherwise-eligible electors (1) who have been convicted of a felony and whose civil rights have not been restored, or (2) those adjudged by a court to be incompetent or partially incompetent, unless the judgment contains certain specifications. In its entirety, Article III, Section 2 reads:

> **Section 2. Laws may be enacted:**
>
> **(1) Defining residency.**
> **(2) Providing for registration of electors.**
> **(3) Providing for absentee voting.**
> **(4) Excluding from the right of suffrage persons:**
> **(a) Convicted of a felony, unless restored to civil rights.**
> **(b) Adjudged by a court to be incompetent or partially incompetent, unless the judgment specifies that the person is capable of understanding the objective of the elective process or the judgment is set aside.**
> **(5) Subject to ratification by the people at a general election, extending the right of suffrage to additional classes.**

2011 Wisconsin Act 23, effective June 10, 2011, now provides that qualified electors under the Wisconsin Constitution may not vote in an election unless they also satisfy the additional requirement that they display acceptable government-

sanctioned photo identification either at the polls or to election officials by 4:00 p.m. on the Friday following the election. *See* §§ 6.79, *et seq.*, Stats.

Plaintiffs League of Women Voters of Wisconsin Education Network, Inc. ("League of Women Voters") and Melanie G. Ramey sue defendants Governor Scott Walker and individual members of the Government Accountability Board ("GAB")[1], in their official capacities, for a declaration under § 806.04, Stats., that those portions of 2011 Wisconsin Act 23 relating to photo ID requirements violate the Wisconsin Constitution, Article III, Sections 1 and 2. They also seek to enjoin the further implementation and enforcement of Act 23's photo ID provisions.

Before the court is plaintiffs' motion for summary judgment, which has been fully briefed and argued. The motion documents reveal no disputed issue of material fact requiring further evidentiary proceedings. They present a purely legal issue ripe for decision. Because plaintiffs are entitled to judgment as a matter of law, their motion is GRANTED as follows.

ANALYSIS AND DECISION

I.

Article III is unambiguous, and means exactly what it says. It creates both necessary and sufficient requirements for qualified voters. **Every** United States citizen 18 years of age or older who resides in an election district in Wisconsin is a qualified elector in that district, unless excluded by duly enacted laws barring certain convicted felons or adjudicated incompetents/partially incompetents.

---

[1] Thomas Barland, Gerald C. Nichol, Michael Brennan, Thomas Cane, David G. Deininger, and Timothy Vocke.

The government may not disqualify an elector who possesses those qualifications on the grounds that the voter does not satisfy additional statutorily-created qualifications not contained in Article III, such as a photo ID. As our Supreme Court stated 132 years ago:

> The elector possessing the qualifications prescribed by the constitution is invested with the constitutional right to vote at any election in this state. These qualifications are explicit, exclusive, and unqualified by any exceptions, provisos or conditions, and the constitution, either directly or by implication, confers no authority upon the legislature to change, impair, add to or abridge them in any respect. In the language of the chief justice, in *Page* v. *Allen,* 58 Pa. St. 346: "These are the constitutional qualifications necessary to be an elector. They are defined, fixed and enumerated in that instrument. In those who possess them is vested a high, and, to a freeman, sacred right, of which they cannot be divested by any but the power which establishes them, viz., the people, in their direct legislative capacity. This will not be disputed. For the orderly exercise of the right resulting from these qualifications it is admitted that the legislature must prescribe necessary regulations as to the places, mode and manner, and whatever else may be required to insure its full and free excrcise. But this duty and right inherently imply that such regulations are to be subordinate to the enjoyment of the right, the exercise of which is regulated. The right must not be impaired by the regulation. It must be regulation purely, not destruction. If this were not an immutable principle, elements essential to the right itself might be invaded, frittered away, or entirely exscinded, under the name or pretence of regulation, and thus would the natural order of things be subverted by making the principle subordinate to the accessory. To state is to prove this position. As a corollary of this, no constitutional qualification of an elector can in the least be abridged, added to, or altered, by legislation or the pretence of legislation. Any such action would be necessarily absolutely void and of no effect."
>
> ...
>
> No registry law can be sustained which prescribes qualifications of an elector *additional* to those named in the constitution, and a registry law can be sustained only, if at all, as providing a reasonable mode or method by which the constitutional qualifications of an elector may be ascertained and determined, or as regulating reasonably the exercise of the constitutional right to vote at an election. If the mode or method, or regulations, prescribed by law for such purpose, and to such end, deprive a fully qualified elector of his right to vote at an election, without his fault and against his will, and require of him what is impracticable or impossible, and make his right to vote depend upon a condition which he is unable to perform, they are as destructive of his constitutional right, and make the law itself as void, as if it directly and arbitrarily disfranchised him without any pretended cause or reason, or required of an elector qualifications additional to those named in the constitution. It would be attempting to do indirectly what no one would claim could be done directly.

Dells v. Kennedy, 49 Wis. 555, 6 N.W. 246, 246-247 (1880) (spelling in original).

II.

By enacting Act 23's photo ID requirements as a precondition to voting, the legislature and governor have exceeded their constitutional authority.

To be sure, the Wisconsin Constitution empowers the legislature and governor to enact laws regulating elections, both expressly and by implication. The *express authority* is found in Article III, Section 2 and is limited to (1) defining residency, (2) providing for registration of electors, (3) providing for absentee voting, (4) excluding from the right of suffrage certain convicted felons and adjudicated incompetents/partially incompetents, and (5) extending the right of suffrage to additional classes of persons, subject to ratification by the electorate at a general election.

Act 23's photo ID requirements do not fall within any of these five categories.

Accordingly, if it exists, the authority to enact photo ID requirements as a qualification[2] to vote must be found by *implication or inference* from the text of the Constitution, particularly Article IV, Section 1 relating to the plenary powers of the

[2] Defendants unsuccessfully attempt to masquerade the photo ID mandate as merely an election regulation requirement, not a qualification for voting, which is a distinction without a difference. However one wishes to parse the English language, a qualified elector without a photo ID is disqualified from voting under Act 23,

senate and assembly. *See e.g. State ex rel. LaFollette v. Kohler*, 200 Wis. 518, 228 N.W. 895, 905-906 (1930).[3]

Herein lies the fatal flaw in defendants' legislative-authority-trumps-constitutional-qualifications argument. The people's fundamental right of suffrage preceded and gave birth to our Constitution (the sole source of the legislature's so-called "plenary authority"), not the other way around. Until the people's vote approved the Constitution, the legislature had no authority to regulate anything, let alone elections. Thus, voting rights hold primacy over implicit legislative authority to regulate elections. In other words, defendants' argument that the fundamental right to vote must yield to legislative fiat turns our constitutional scheme of democratic government squarely on its head.

This is why, over the years, although recognizing that the legislature and governor are accorded implicit authority to enact laws regulating elections, our Supreme Court has repeatedly admonished that such laws cannot destroy or substantially impair a qualified elector's right to vote. On this point, for example, our Supreme Court has held:

> **The right of a qualified elector to cast a ballot for the election of a public officer, which shall be free and equal, is one of the most important of the rights guaranteed to him by the constitution. If citizens are deprived of that right, which lies at the very basis of our Democracy, we will soon cease to be a Democracy. For that reason no right is more jealously guarded and protected by the departments of government under our constitutions, federal and state, than is the right of suffrage. It is a right which was enjoyed by the people before the adoption of the constitution and is one of the inherent rights which can be surrendered only by the people and subjected to limitation only by the fundamental law.** State ex rel. McGrael v. Phelps, 1910, 144 Wis. 1, 128 N.W. 1041, 35 L.R.A.,N.S., 353; State ex rel. Barber v. Circuit Court, 1922, 178 Wis. 468, 190 N.W. 563
>
> **While the right of the citizen to vote in elections for public officers is inherent, it is a right nevertheless subject to reasonable regulation by the legislature. State ex rel. McGrael v. Phelps, supra; State ex rel. La Follette v. Kohler, 1930, 200 Wis. 518, 228 N.W. 895, 69 A.L.R. 348, and cases cited.**

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[3] Defendants conceded this point at oral argument.

> It is true that the right of a qualified elector to cast his ballot for the person of his choice cannot be destroyed or substantially impaired. However, the legislature has the constitutional power to say how, when and where his ballot shall be cast for a justice of the supreme court.
>
> Legislation regulating the exercise of the elective franchise is subject to at least five tests:
>
> (a) The express and implied inhibitions of class legislation;
>
> (b) The recognized existence and inviolability of inherent rights;
>
> (c) The constitutionally declared purposes of government;
>
> (d) The express guaranty of the right to vote, and
>
> (e) The regulation must be reasonable.

State ex rel. Frederick v. Zimmerman, 254 Wis. 600, 613-614 (1949).

However, Act 23 goes beyond mere regulation of elections. Its photo ID requirements impermissibly eliminate the right of suffrage altogether for certain constitutionally qualified electors. As just one example, an individual who has incontrovertible and even undisputed proof at the polls that he/she is a qualified elector under Article III, but lacks statutorily acceptable photo ID then or by the following Friday, may not vote under Act 23.

Thus, Act 23's photo ID requirements are unconstitutional because they abridge the right to vote. *State ex rel. McGrael v. Phelps*, 144 Wis. 1, 128 N.W. 1041, 1047 (1910). Regulation may not deny the right of suffrage, either directly or indirectly. *Barber v. Circuit Court for Marathon County,* 178 Wis. 468, 190 N.W. 562, 566 (1922). This has been the law of Wisconsin since its birth:

> an act of the legislature which deprives a person of the right to vote, although he has every qualification which the constitution makes necessary, cannot be sustained.

State ex rel. Knowlton v. Williams, 5 Wis. 308, 316 (1856). *See also State ex rel Wood v. Baker*, 38 Wis. 71, 86 *et seq.* (1875).

Worded differently, as a matter of law under the Wisconsin Constitution,

sacrificing a qualified elector's right to vote is not a reasonable exercise of the government's prerogative to regulate elections. *See. e.g. Dells v. Kennedy* and *State ex rel. McGrael v. Phelps, supra.*

Finally, on this point, we cannot ignore the proper role of the courts in constitutional litigation. Because the Wisconsin Constitution is the people's bulwark against government overreach[4], courts must reject every opportunity to contort its language into implicitly providing what it explicitly does not: license to enact laws that, for any citizen, cancel or substantially burden a constitutionally-guaranteed sacred right[5], such as the right to vote.[6] Otherwise we stray into judicial activism at its most insidious. Our Constitution is a line in the sand drawn by the sovereign authority in this state – the people of Wisconsin[7] – that the legislature, governor, and the courts may not cross, particularly under the all-too-convenient guise of strained construction and attenuated inference.

III.

Affidavits have been submitted by *amici curiae* Wisconsin Democracy

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[4] "As often said and always conceded, our state Constitution is not so much a grant as a limitation of powers...". *State ex rel. Binner v. Buer*, 174 Wis. 120, 182 N.W. 855, 857 (1921).

[5] "The constitutional right of an elector to have any reasonable expression of his intention in voting given effect is of the most sacred character...". *State v. Anderson*, 191 Wis. 538 (1928).

[6] Tellingly, in contrast to the very limited, specific authority to deny the right of suffrage to only two classes of individuals otherwise qualified to vote under Article III (certain convicted felons and adjudicated incompetents/partial incompetents), Section 2 provides the government with virtually unlimited authority to extend the right of suffrage to additional classes of people, provided that the people of this state agree at a general election. Far-fetched is the notion that, in adopting Section 2, the people of this state chose to retain strict oversight over the expansion of the voter rolls, but simultaneously chose to grant the state silent, implicit authority to disenfranchise qualified electors without *any* direct oversight.

[7] *State ex rel. LaFollette v. Kohler*, 200 Wis. 518, 228 N.W. 895, 905 (1930) ("In theory, the sovereign political power of the state rests in the people...").

Campaign and Dane County demonstrating the very real disenfranchising effects of Act 23's photo ID requirements. They show that many constitutionally qualified electors from all walks of life will be blocked from voting at the polls by Act 23, involuntarily and occasionally through no fault of their own. Governor Walker and the GAB correctly observe that this court may not rely on this evidence in deciding plaintiffs' purely facial challenge to Act 23's constitutionality. Indeed, it is not necessary to consider the human cost of photo ID requirements in order to expose their constitutional deficiencies. As seen above, they are unconstitutional on their face.

Still, there is no harm in pausing to reflect on the insurmountable burdens facing many of our fellow constitutionally qualified electors should Act 23 hold sway. These disenfranchised citizens would certainly include some of our friends, neighbors and relatives. Mostly they would consist of those struggling souls who, unlike the vast majority of Wisconsin voters, for whatever reason will lack the financial, physical, mental, or emotional resources to comply with Act 23, but are otherwise constitutionally entitled to vote. Where does the Wisconsin Constitution say that the government we, the people,[8] created can simply cast aside the inherent suffrage rights of any qualified elector on the wish and promise – even the guarantee – that doing so serves to prevent some unqualified individuals from voting?[9]

It doesn't. In fact, it unequivocally says the opposite. The right to vote belongs to all Wisconsin citizens who are qualified electors, not just the fortunate majority for whom Act 23 poses little obstacle at the polls.

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[8] Wisconsin Constitution, Preamble.

[9] Whether photo ID at the polls is a good idea or bad, effective as a means of stifling voter fraud or not, is beside the point of this decision and order. The sole issue before the court is the constitutionality of Act 23's photo ID requirements. Questions regarding the merits of photo ID as a pre-requisite to voting are appropriately addressed only to the electorate in the form of a constitutional amendment.

Accordingly, while the legislature and governor are constitutionally accorded broad authority to police fraud in elections, including through criminal and civil penalties, their power, like all police power, ends at the precise point where it transgresses the fundamental voting rights of Wisconsin citizens:

> **It has become elementary that constitutional inhibitions of legislative interference with a right, including the right to vote and rights incidental thereto, leaves, yet, a field of legislative activity in respect thereto circumscribed by the police power. That activity appertains to conservation, prevention of abuse and promotion of efficiency. Therefore, as in all other fields of police regulation, it does not extend beyond what is reasonable. Regulation which impairs or destroys rather than preserves and promotes, is within condemnation of constitutional guarantees. So it follows that, if the law in question trespasses upon the forbidden field, it is only law in form.**

State ex rel. McGrael v. Phelps, 144 Wis. 1, 128 N.W. 1041, 1047 (1910).

CONCLUSION AND ORDER

Without question, where it exists, voter fraud corrupts elections and undermines our form of government. The legislature and governor may certainly take aggressive action to prevent its occurrence. But voter fraud is no more poisonous to our democracy than voter suppression. Indeed, they are two heads on the same monster.

A government that undermines the very foundation of its existence – the people's inherent, pre-constitutional right to vote – imperils its legitimacy as a government by the people, for the people, and especially of the people. It sows the seeds for its own demise as a democratic institution. *See State ex rel. Frederick v. Zimmerman, supra*. This is precisely what 2011 Wisconsin Act 23 does with its photo ID mandates.

Judgment is rendered declaring 2011 Wisconsin Act 23's photo ID requirements unconstitutional to the extent they serve as a condition for voting at the polls. Moreover, defendants are permanently enjoined forthwith from any further implementation or enforcement of those provisions.

To be clear, this court does not hold that photo ID requirements under all circumstances and in all forms are unconstitutional *per se*. Rather, the holding is simply that the disqualification of qualified electors from casting votes in any election where they do not timely produce photo ID's satisfying Act 23's requirements violates Article III, Sections 1 and 2 the Wisconsin Constitution.

This order is FINAL for purposes of appeal.

Dated this ____ day of _____, 2012.

BY THE COURT:

_____

Richard G. Niess

Circuit Judge

CC: Attorneys Susan M. Crawford/Lester A. Pines/Tamara B. Packard

Attorney General J.B. Van Hollen/Assistant Attorney General Clayton P. Kawski/Assistant Attorney General Carrie M. Benedon

Attorney Peter E. McKeever

Assistant Dane County Corporation Counsel Dyann Hafner

EXHIBIT 2

STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

Milwaukee Branch of the NAACP, et al.,

PLAINTIFFS,

vs.

Case No. 11 CV 5492

Scott Walker, et al.,

DEFENDANTS

ORDER GRANTING MOTION FOR TEMPORARY INJUNCTION

This is an action seeking declaratory and injunctive relief seeking to preclude enforcement of that that portion of 2011 Wisconsin Act 23 which requires Wisconsin electors to produce one of several specific forms of photo identification in order to receive an election ballot. This case is set for trial commencing April 16, 2012. Pending trial, the plaintiffs have moved for a temporary injunction. Both sides have submitted argument as to the applicable legal principles as well as evidence in the form of written affidavits. An evidentiary hearing was conducted March 1, 2012 in which the testimony of UW Political Science Professor Kenneth Mayer was presented on behalf of the plaintiffs.

The motion for temporary injunctive relief poses two issues before the court. The court must first determine whether the moving party demonstrated the probability of eventual success at trial. If there is such a showing, the court must then determine whether it is probable that the moving party will suffer irreparable harm if the court fails to render a temporary injunctive order, Werner v. A.L. Grootemaat & Sons, Inc., 80 Wis. 2d 513, 520, 259 N.W.2d 310 (1977). For the reasons set forth below, the court concludes that the plaintiffs have demonstrated the probability of success as well as the likelihood of irreparable harm. The court therefore orders that the defendant cease enforcement of Act 23 as to any requirement of photo identification of voters pending further order of this court.

I. The Plaintiffs' Claims are Founded Exclusively Upon the Wisconsin Constitution

The plaintiffs have based this case exclusively upon the guarantees set forth in the Wisconsin Constitution.[1] They do not look to the U.S. Constitution as the basis for their claims. The Wisconsin Constitution sets out the basic framework of our state government. The right to vote is a fundamental, defining element of our society. The Wisconsin Supreme Court has described it as a "sacred right", Dells v. Kennedy, 49 Wis. 555, 6 N.W.246, 247 (1880), quoting Page v. Allen, 58 Pa. St. 346. It is a right which is explicitly and broadly guaranteed in the Constitution, in Article III, Suffrage.

> **Electors.** Section 1.
>
> Every United States citizen age 18 or older who is a resident of an election district in this state is a qualified elector of that district.

The Wisconsin Supreme Court has often used the term "constitutionally qualified elector" to describe one eligible to vote in our state, e.g. Dells, supra, at p. 558. That is because the Constitution, not the legislature or any law enacted by the legislature, is source of the right to vote and, unlike the United States Constitution, the Wisconsin Constitution sets forth explicitly the requirement for eligibility to vote, Art I, Sec. 2 (4). The court must begin any consideration of voter eligibility legislation with the recognition of this bedrock constitutional foundation of Wisconsin voter eligibility.

The legal issue before this court what is permitted by the Wisconsin Constitution and that issue is not to be determined by what is permitted in other states. It does give one pause, however, to contemplate the possibility that with Act 23, Wisconsin now has the benefit and the burden of the single most restrictive voter eligibility law in the United States. That was the view offered in the testimony of Professor Mayer and it is consistent with appellate decisions considering voter identification law in Indiana, Missouri, Georgia and Michigan, Crawford v. Indiana, 663 U.S. 181 (2008), Weinschenk v. State, 203 S.W.3d 201 (Mo. 2006), Democratic Party of Georgia, Inc. v. Perdue, 288 Ga. 720, 726, 707 S.E. 2d 67, (Ga. 2011), Request for Advisory Opinion, 479 Mich. 1, 740 N.W.2d 444, 456-457 (2007) .

[1] There are now before the court three claims. They are allege denial of the right to vote guaranteed in Article III, Section 1, denial of substantive due process and denial of equal protection, Article I, Section 1. The parties have agreed to withdraw from consideration in this action, a fourth claim which alleged that Act 23 improperly imposes voter qualifications beyond those specified in Article III, Section 2(4).

II The Demographic Evidence Offered by the Plaintiff is Competent, Adequate and Persuasive.

The plaintiff has offered the testimony of Professor Kenneth Mayer as well as two reports prepared by him, January 16, 2011 [sic], Exhibit 41, and February 5, 2012, Exhibit H. In his testimony and the reports Professor Mayer relies upon census data, a 2010 reference guide of the Wisconsin Department of Transportation and specific demographic reports from accepted sources, including a 2006 study by Professor John Pawasarat, Director of the Employment and Training Institute of the University of Wisconsin-Milwaukee, "Drivers License Status of Voting Age Population in Wisconsin". The Pawasarat study is particularly important in that it is the only extant study of Wisconsin voting age demographics based upon the access to the drivers license data bank of the Wisconsin Department of Transportation. The defense has questioned closely the adequacy and specificity of Professor Mayer's data but has not challenged the authenticity or the reliability of the sources of that data. The court concludes that the testimony offered by Professor Mayer is competent, well-founded, entirely credible and persuasive.

III. A significant proportion of constitutionally eligible voters in Wisconsin do not possess acceptable photo identification.

A majority of constitutionally eligible Wisconsin voters possess a valid drivers license. For them, the required presentation of that license at the poll poses no particular problem. A minority of eligible voters who do not possess a drivers license have obtained a photo identification card from the Wisconsin Department of Transportation (WisDOT). Professor Mayer offered evidence that as of 2002 there were some 221,975 constitutionally qualified voters in Wisconsin who do not possess a drivers license of a voter photo identification. That number is based upon the Pawasarat study reduced by exclusions for felony convictions and non-citizens residing, both legally and illegally, in Wisconsin.[2] There are other acceptable forms of voter identification but Professor Mayer offered the opinion that these would not significantly modify the resulting number of constitutionally qualified voters without a photo ID.[3]

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[2] The Pawasarat study began with the Wisconsin census population for 2000 and then incorporated WisDOT drivers license data for 2002. Professor Pawasart did not adjust for mortality between 2000 and 2002 but that adjustment was calculated by Professor Mayer to have been a minor factor. Moreover, the drivers license data reportedly does not account for mortality either. In any event, the essential question is the proportion of eligible voters with and without photo identification and any minor adjustment for mortality would apply to both groups.

[3] A Passport is an acceptable form of photo identification as is a current student identification and Military identification. There are no available data as to the number of passports held by Wisconsin residents and Professor Mayer assumed that few passport holders would not also hold a drivers license.

Any effort to capture a demographic reality of the entire state will necessarily involve estimates and professional judgment. Professor Mayer testified that he began with the best available base data and made consistently conservative adjustments to produce a reliable measure of the number of voters, presently eligible under the Wisconsin Constitution who are to be turned away if they attempt to vote in the next election.[4] The court concludes that number of such constitutionally qualified voters demonstrated by the work of Professor Mayer both a reliable measure and a legally significant proportion of the Wisconsin electorate.

IV. 2011 Wisconsin Act 23 Imposes a Substantial Burden upon Constitutionally Qualified Voters

An eligible voter who does not possess a drivers license may apply for a voter identification card from the WisDOT. It has been represented that there is no direct fee for this identification but that is at best a somewhat incomplete picture. The plaintiffs have submitted the affidavits of forty individuals each of whom describes the process of attempting to obtain the identification document. Nineteen people obtained a voter ID card only after paying between $14 and $39.50 to obtain a certified birth certificate from Wisconsin or elsewhere This is a real cost that is imposed upon constitutionally eligible voters and was found to be an improper burden by the Missouri Supreme Court, Weinschenck, supra, at p. 209. A poll tax of $1.50 upon otherwise eligible voters was deemed an unconstitutional impairment in Harper v. Virginia Board State of Elections, 383 U.S. 663 (1966).

The forty uncontested affidavits offer a picture of carousel visits to government offices, delay, dysfunctional computer systems, misinformation and significant investment of time to avoid being turned away at the ballot box. This is burdensome, all the more for the elderly and the disabled. This lawsuit is a facial challenge to the constitutionality of Act 23, and the court must focus upon the impact of the law across the entire state, rather than specific individuals. It is however, useful to consider actual difficulties experienced, given the number of eligible voters affected as well as the inflexibility of the Act 23, a matter to be discussed below.

Mr. Ricky Tyrone Lewis is 58 years old, a Marine Corps Veteran and a lifelong Milwaukee resident. He was able to offer proof of his honorable discharge but Milwaukee

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Professor Mayer considered the number of voting age students and again determined there many likely possessed a drivers license. The number of military identification held by persons also lacking a drivers license was assumed, and reasonably so, to be of minimal statistical significance.

[4] This appears to be a substantially more refined analysis than that which was available to the Court of Appeals in McNally v. Tollander, 97 Wis. 2d 583, 591 fn 4.

County has been unable to find the record of his birth so he cannot obtain a voter ID card. Ms. Ruthelle Frank, now 84, is a lifelong resident of Brokaw, Wisconsin and a member of her town board since 1996. She has voted in every election over the past 64 years but she does not have a voter ID card. She located her birth certificate but found that her name was mis-spelled. She was advised to obtain a certified copy of the incorrect birth certificate and try to use that to obtain a voter ID card.

V. There is No Evidence of Voter Fraud that would have been Prevented by Act 23

The plaintiffs do not dispute, and the court certainly accepts fully the value of maintaining the accuracy and security of the ballot process. At this point, however, the record is uncontested that recent investigations of vote irregularities, both in the City of Milwaukee and by the Attorney General have produced extremely little evidence of fraud and that which has been uncovered, improper use of absentee ballots and unqualified voters, would not have been prevented by the photo identification requirements of Act 23. Photo identification does offer assurance that the person standing at the poll is not actually another person. It does not assure that the person is qualified to vote. It does not preclude the person having also voted by absentee. Moreover, Professor Mayer testified that it is generally accepted within his field of study that fraudulent misrepresentation of voter identification is extremely unlikely because the felony penalty is severe and the potential benefit is extremely limited. This testimony is plausible, consistent with available evidence, un-contradicted and persuasive.

VI. The Act 23 Photo Identification Requirement is a Notably Inflexible Process

It is a salient feature of Act 23 that it does not mandate any sort of review or validation of the ballot of a constitutionally qualified voter who lacks the required photo identification. Under Act 23, a constitutionally qualified voter who cannot produce the required photo identification at the polling place, or within three days thereafter, is simply prohibited from voting. That is something very different and significantly more of an impairment than any mechanism whereby a provisional ballot might be held to the side for further validation. By sharp contrast, the Indiana voter identification law considered by the Supreme Court in Crawford, supra, a voter not able to produce the photo ID because of indigency or religious concerns, could cast a provisional vote which would be counted so long as the exception was affirmed by affidavit within ten days. The Supreme Court acknowledged that the Indiana law imposed a burden on certain groups but process did permit a degree of accommodation not available under Act 23. The Georgia voter identification law, upheld in Democratic Party of

Georgia, Inc. v. Perdue, 288 Ga. 720, 707 S.E. 2d 67 (2011), required photo identification but also permitted one to vote upon signing an affidavit affirming the voter's identity, at p. 720.

VII. Constitutionally Qualified Wisconsin Voters who do not Possess a Drivers License are Disproportionately Elderly, Indigent or Members of a Racial Minority.

The plaintiffs in this lawsuit do not contend that Act 23 is intentionally directed at the elderly, the indigent or members of racial minorities. Professor Mayer, however, offered uncontested testimony that that the burdens created by Act 23 will necessarily fall more heavily upon these groups. The touchstone of the voter identification system is the drivers license. Statewide, 80 percent of men and 81 percent of women posses a valid Wisconsin drivers license. For minority members, the picture is substantially different, however; In Wisconsin, 45 percent of African-American males and 51 [percent of females possess a license. As to Hispanics, 54 percent of males and 41 percent of females have a Wisconsin license. 23 percent of residents age 65 and older do not possess a drivers license, Pawasarat, Ex, D. As noted, obtaining a voter ID cared can be tedious and is not really cost-free. This burden is certainly no less for qualified voters who are indigent or elderly

VIII. The Court must carefully consider the Purpose, the Benefits and the Burdens of Act 23 in Light of the Wisconsin Constitution's Guarantee of the Right to Vote .

The parties dispute the extent to which this court may review the choice of the legislature to adopt Act 23. Essentially, the defendants argue that the court must give deference to the legislature's decision to adopt this law and indeed, it is true that a court does not hold authority to usurp the legislative's role and should be very cautious in undertaking any sort of review of an act of the legislature. This deferential approach is known as the rational basis standard of review. The plaintiffs, by contrast, look to past decisions of the Wisconsin Supreme Court to argue that the right to vote is so critical, so fundamental, that this court should examine carefully and closely the impairment that they claim the legislation is likely to have upon that exercise of that right.

A. The Wisconsin Supreme Court has not Deferred to the Legislature on Questions of Voter Qualification.

No court should hastily entertain a challenge to the constitutionality of any act of the Legislature and, indeed, every act of the legislature must be assumed to be consistent with the constitution. The burden lies with the party challenging a law to demonstrate clearly the basis for that challenge. It is also true, however, that the Wisconsin Supreme Court has consistently

acknowledged that the qualification for voting is guaranteed in the constitution and cannot be changed by statute or impaired by regulation. Whenever, there has been a challenge in an election case, particularly a challenge involving a voters actual access to vote at the poll, the court has always looked both to the purpose and benefits of the law but also to the impact of the law.

In 1864, the Legislature passed an Election Registry Law which created a system where officials were to prepare a list of qualified voters prior to an election In State ex. Rel. Wood v. Baker, 38 Wis. 71 (1875), the court considered a challenge to an election result in which the officials is several wards had failed to prepare properly the registry list. It was uncontested that the officials had failed and the registry law required that the votes of otherwise qualified voters not be counted. The court acknowledged the proper purpose of the law but held that the voters' right to vote was protected by the constitution and ruled that the votes must be counted. A registry law was again in issue in Della v. Kennedy, 49 Wis. 555 (1880). The plaintiff claimed that he was qualified to vote but had been turned away at the poll because he had not appeared to register prior to election day as required by an 1879 registry statute. The circuit court enforced the law but the Supreme Court reversed that decision, holding that the constitutional right to vote could not be impaired by the registry requirement. In Ollmann v. Kawalewski, 238 Wis. 574 (1941), certain Milwaukee County ballots had not been properly marked when received by election officials. Although applicable state election law required that such ballots not be counted the election officials did include them. The circuit court declined to exclude the ballots, in its decision the Supreme Court agreed that they should be counted. Beginning with the observation that, "Voting is a constitutional right, Art III, § 1, Consti., and any statute that denies a qualified elector the right to vote is unconstitutional and void" the court refused to interpret the law to require exclusion of the votes. The point here is that the Wisconsin Supreme Court has examined closely and carefully challenges to voter statutes which have had the effect of impairing voter access.

The critical need to protect zealously voter access to the ballot was at the heart of the decision in McNally v. Tollander, 100 Wis.2d 490 (1981), involving an election held to determine the location of the Burnett County seat. Officials in eight of twenty-four town refused to distribute ballots to voters thus excluding approximately forty percent of the qualified voters. The trial court declared the election void but the Court of Appeals reversed citing an 82 percent voter participation and the need to respect an election result. The Supreme Court, however, based its view of the fact that a significant minority of qualified voters had been denied the opportunity to vote and declared the election void.

The defendants suggest that this court should defer to the determination of the Legislature in this dispute and need not look closely that the possibility of impairment of the constitutional right to vote. The court does not find support for that suggestion in the most applicable Wisconsin Supreme Court decisions. It its true that the Court has deferred to legislative determinations in election matters not involving direct voter access, such as the introduction of the combined "Australian" ballot form, State ex. Rel Van Alstine v. Frear, 142 Wis. 320 (1910) and the timing of an election, State ex Rel. Frederick v. Zimmerman, 254 Wis. 600 (1949). Even in such areas, however, the Supreme Court still looked to the constitution, not statutory law as the foundation for election process, refusing to interpret a statute to set qualifications for office, State ex Rel. Barber v. Circuit Court, 178 Wis. 468 (1922). Further, in upholding statutory election regulation, the court has considered both the benefits and burdens of regulation to be sure that there be the "freest opportunity practicable is given under the law for the voter" to cast a ballot, State ex rel. Runge v. Anderson, 100 Wis. 523, 76 N.W. 482, 485 (1898).

The court concludes that when the issue is whether a legislative enactment substantially impairs the constitutionally guaranteed right to vote, a court has the authority and the obligation at least to consider the actual impact rather than simply deferring to the stated purpose of the law.

B. The Proper Level of Judicial Review is Strict or Heightened Scrutiny

The right to vote has been characterized as "inherent,..fundamental ... sacred", State ex Rel . McGrael v. Phelps, 144 Wis. 1, 128 N.W. 1041, 1046. Where a statute implicates a fundamental interest, it is the obligation of a court apply a strict or heightened level of review to the statute to determine it remains within that range of authority permitted under the constitution, In re Zachary B., 271 Wis.2d 51, 62 (2004) This means that the court must look not only look to see if the law speaks to a legitimate purpose but mist go further, as the Wisconsin Supreme Court has done in the past, to consider the both the benefits and the burdens of the law. It means that when the law in question seeks to regulate a fundamental right, the burden then shifts to the government to justify the enactment.

Looking first to the purpose of the law, it is to protect the integrity of the election process and, as an abstract concept that surely is a proper and compelling governmental interest. It seeks, however, to regulate a most fundamental interest, the constitutionally guaranteed right to vote. The next question then, is to ask if is narrowly tailored to serve that interest effectively without imposing a significant burden upon the opportunity to constitutionally qualified voters to gain access to the ballot. Or, as expressed by the Wisconsin Supreme Court, does this the election law pass the test

that it "must be reasonable", State ex rel. Frederick, supra, at p. 614. Thus the court must consider not only the purpose of the law but also the possibility that it will impair the fundamental constitutional citizens to vote in Wisconsin. Such scrutiny is required by the significance of the interests involved.

IX. The Photo Identification Requirement of Act 23 has been shown to be an Improper Impairment of the Constitutional Right to Vote.

Act 23 is addressed to a problem which is very limited, if indeed extant. Seemingly it fails to account for the difficulty its demands impose upon indigent, elderly and disabled citizens who are qualified under the constitution to vote. It offers no flexibility, no alternative to prevent to exclusion of a constitutionally qualified voter. By contrast, the sweep and impact of the law is very broad. Given the sacred, fundamental interest in issue, it is very clear that Act 23, while arguably addressing a legitimate concern has not been sufficiently focused to avoid needless and significant impairment of the right to vote. The enactment steps beyond the proper authority of the legislature and is in violation of the Wisconsin Constitution, Article III, Section 1.

X. The Decision of the U S Supreme Court in Crawford v. Indiana does not Require Judicial Deference to Act 23

The defense submits that the court should be guided by the decision of the U. S. Supreme Court in Crawford v. Marion County Election Board, 553 U.S. 181 (2008) in which the court considered challenge to the Indiana voter ID law. The Crawford decision has very little application to the dispute now before this court, however, for three primary reasons. First, this case is founded upon the Wisconsin Constitution which expressly guarantees the right to vote while Crawford was based upon the U.S. Constitution which offers no such guarantee. Second, the Indiana law is less rigid than Act 23, and as noted by the U.S. Supreme Court, offered alternative voting opportunities to voters who lacked the photo ID. Finally, the Crawford case came to the court based upon a flawed factual record lacking the substantial evidence that has been offered by the plaintiffs in this action.

This case is a claim that Act 23 violates the Wisconsin Constitution, not the U. S. Constitution. The people of Wisconsin may choose to assure to themselves rights under their own constitution that differ or exceed those guaranteed under the U.S. Constitution, State v. Doe, 78 Wis. 2d 161, 172 (1977). The question of what is permitted and what is protected by the Wisconsin Constitution is the issue before this court and that issue was not before the U.S. Supreme Court in the Crawford case..

The Indiana voter ID law permitted one lacking a photo ID to cast a provisional ballot which will be counted if the voter files, within ten days, an affidavit stating that the voter is indigent or has a religious objection to being photographed. This available alternative was relied upon by the court in rendering its decision to mitigate the acknowledged impact of the law upon the elderly and indigent, Crawford, supra, at p. 199. By contrast, in Wisconsin may cast a provisional which is counted only if the voter shows in three days with the required photo ID.

Finally, the district court considering the record which became the basis of the Crawford decision, described the factual showing of the critics of the voter identification law as "utterly incredible and unreliable," Crawford, supra, at Indiana Democratic Party v. Rokita, 458 F.Supp. 2d 775, 803 (U.S.D.C. S.D. Ind. 2006). Here, as noted above, the showing by the plaintiffs has been substantial, entirely credible and uncontested. This is situation very different from that before the Supreme Court in Crawford.

XI. The Plaintiffs have Demonstrated the Probability of Success on the Merits

The history of the Wisconsin Supreme Court's effort to carefully preserve the broad constitutional right to vote is particularly clear. The fundamental character of the right in issue is vital to the very existence of our state as a democracy in which political power, whether that be executive, legislative or judicial, is derived from the free consent of the governed. The scope of the impairment has been shown to be serious, extremely broad and largely needless. There is no doubt that the plaintiffs have shown a very substantial likelihood of success on the merits.

XII. The Plaintiffs have Demonstrated a Substantial Probability of Irreparable Harm

The question of irreparable harm poses a difficult question to the court. The defendants have demonstrated the substantial efforts undertaken by the Government Accountability Board to implement the requirement of Act 23. The court is mindful of the potential for difficulty which will ensue if the new requirements are now withdrawn, Purcell v. Gonzalez, 549 U.S. 1, 5 (2006). It remains true and, for this court, dispositive that the new voter identification requirements implements by Act 23 will likely exclude from the election process a significant portion of Wisconsin voters who are qualified under our constitution to participate in this process. The rigid nature of Act 23 requires that, for them, this opportunity be forever lost. Justice William Scalia, in his concurring opinion in Crawford, noted the need to determine, as quickly as practicable, the applicable rules in election law cases so as to assure the validity of the election process, Crawford,

supra, at 207. So too, here. If an injunction issues, the election will go forward and constitutionally qualified voters be not be excluded. Difficulties may ensue but that is because an unconstitutional regulation had been unwisely attempted. If no injunction is issued, a clearly improper impairment of a most vital element of our society will occur. The duty of the court is clear. The case has been made. Irreparable harm is likely to occur in the absence of an injunction.

ORDER

It is the order of the court that the defendant shall cease immediately any effort to enforce or implement the photo identification requirements of 2011 Wisconsin Act 23, pending trial of this case and further order of the court.

By the court this 6th day of March, 2012.

Judge David Flanagan

Brandt, Karen J (15243)

From: ecfmaster@wied.uscourts.gov
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Eastern District of Wisconsin

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Docket Text:
LETTER from Attorney Douglas M. Poland *regarding two orders issued recently in Dane County Circuit Court as to 2011 Wisconsin Act 23.* (Attachments: # (1) Ex 1 - League of Women Voters v. Walker Summary Judgment Decision dated 3-12-2012, # (2) Ex 2 - Milw Branch of NAACP v Walker Temporary Injunction Decision dated 3-6-2012)(Poland, Douglas)

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